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February 4, 1998

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VIA HAND DELIVERY

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Iowa Communications Network
Eligibility for Universal Service Payments
CC Docket No. 96-45

Dear Ms. Salas:

On behalf of our client the Iowa Telecommunications and Technology Commission, operating the Iowa Communications Network (collectively, the "ICN"), we are writing to seek an expedited determination from the Commission that the ICN is eligible under Section 254 of the Communications Act and the Commission's Rules to receive universal service payments as a provider of telecommunications services to school, libraries and rural health care institutions. As shown below, the ICN meets the standards set forth in the Commission's *Universal Service Order*^{1/} and *Fourth Order on Reconsideration*^{2/} for providers of telecommunications service. ICN requests expedited consideration of this request because the window for initial schools and libraries funding will close soon and it is important for eligible Iowa entities to know that ICN's services qualify for funding.

^{1/} Federal-State Joint Board on Universal Service, *Report and Order*, 12 FCC Rcd 8776 (1997) (the "*Universal Service Order*").

^{2/} Federal-State Joint Board on Universal Service, *Fourth Order on Reconsideration in CC Docket No. 96-45, Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72*, FCC 97-420 (rel. Dec. 30, 1997) (the "*Fourth Order on Reconsideration*").

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Treatment of ICN as a Telecommunications Service Provider

In the *Universal Service Order*, the Commission determined that an entity would be treated as a telecommunications service provider for purposes of Section 254 if that entity would be considered a common carrier under preexisting Commission precedent.^{3/} The Commission also recognized that a provider need not offer the entire range of common carrier services to all potential customers for such services to qualify as a common carrier, noting, for instance, that provision of “carriers’ carrier” services would be sufficient for a provider to be considered a common carrier.^{4/} The Commission reiterated this determination in the *Fourth Order on Reconsideration*.^{5/}

The essence of common carriage is whether an entity holds itself out indifferently to its potential customers. As the *Fourth Order on Reconsideration* explains, if a provider serves a small number of customers and negotiates individual arrangements with each of those customers, then it is treated as private carrier. If, on the other hand, a provider offers services on standard terms and conditions or serves a wide range of customers, then the provider is a common carrier, subject to common carrier obligations and eligible for common carrier privileges.^{6/} As the D.C. Circuit held in *NARUC I*, an entity “may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population. And business may be turned away either because it is not of the type normally accepted or because the carrier’s capacity has

^{3/} *Universal Service Order*, 12 FCC Rcd at 9177-78.

^{4/} *Id.* This determination is consistent with earlier Commission rulings that specialized carriers of various types were common carriers under the Communications Act. *See, e.g., Teleport Communications Group, Inc.*, 7 FCC Rcd 5986, 5987 (determination that alternative access provider “is a non-dominant carrier which uses fiber optic lines to provide certain common carrier telephone services”).

^{5/} *Fourth Order on Reconsideration* at ¶ 187.

^{6/} While the *Universal Service Order* and *Fourth Order on Reconsideration* identify common carriers as telecommunications carriers, the definition of “telecommunications carrier” in the Communications Act appears to encompass some types of service providers that would not be classified as common carriers. *See* 47 U.S.C. § 3(44). ICN, however, meets the criteria for being categorized as a common carrier, so further inquiry into the meaning of “telecommunications carrier” is unnecessary.

been exhausted.”^{7/} Moreover, “[t]he cases make clear . . . that common carriers need not serve the whole public[.]”^{8/}

In light of these standards, ICN submits that it meets the requirements for being a telecommunications services provider under Section 254. First, while ICN provides a limited range of services, it holds itself out to all of its potential customers for those services. For instance, ICN’s distance learning services are available to all educational institutions in the state, including schools, colleges and universities, private or public.^{9/} Similarly, ICN’s telemedicine services are available to health care institutions across the state, including public hospitals (whether operated by the state, local governments or the federal government), private hospitals, public and private long term care facilities qualifying as a physician’s clinic and other physician’s clinics. (In effect, telemedicine services are available wherever there is a doctor.) Although these services are, as a practical matter, of value only to a limited segment of the telecommunications services marketplace, that does not affect the common carrier nature of ICN’s offerings because the services are available to all entities that can use them.^{10/} In addition, services that ICN provides to entities such as public libraries generally may be used by any member of the public.

Second, ICN offers its services on generally available terms and conditions and does not negotiate individually with any of its customers. All of ICN’s customers take their services from an established rate schedule and are free to choose to purchase those services from ICN or from another service provider.^{11/} ICN’s reliance on rate schedules differentiates

^{7/} *Nat. Ass’n of Regulatory Utility Comm’rs v. F.C.C.*, 525 F.2d 630, 641 (D.C. Cir. 1976) (“*NARUC I*”).

^{8/} *Id.* at 642, citing *Terminal Taxicab Co. v. Kutz*, 241 U.S. 252, 255 (1927).

^{9/} The eligible entities also include home schoolers certified under state educational laws.

^{10/} See *NARUC I*, 525 F.2d 641 (common carrier’s services need not “practically be available to the entire public”). Moreover, to grant the relief requested in this letter, the Commission need not conclude that all of ICN’s services are offered on a common carrier basis, but only that some ICN services are offered on that basis.

^{11/} In this respect, ICN differs from many of the “state telecommunications networks” described in the *Fourth Order on Reconsideration*, which require their state and local government customers to purchase all telecommunications services through the state network. No such requirement exists in Iowa.

it from private carriers that negotiate with each customer and further underscores its similarities to other common carriers.

A third factor that demonstrates that ICN is a common carrier and not a private carrier is the number of individual customers it serves. Unlike, for instance, the electric utility in *Norlight*, which was determined to be a private carrier in part because it intended to negotiate specific arrangements with a handful of customers, ICN literally serves hundreds of customers in Iowa.^{12/} While the number of customers increases frequently, ICN now serves more than 500 discrete entities pursuant to separate service agreements. This customer count is based not on locations served but on the number of distinct customer accounts billed by the ICN for the services it provides; ICN actually serves in excess of 1,600 separate locations. Simply put, the size of ICN's customer base certainly exceeds any upper limit on the number of customers that a private carrier may have, regardless of where the Commission might set that limit.

Thus, ICN holds out its services indiscriminately; sets standard rates and does not negotiate individual contracts; and serves hundreds of customers. Taken together, these facts demonstrate definitively that ICN cannot be considered a private carrier and must be considered a common carrier. ICN recognizes that a Commission determination to this effect not only will result in ICN being eligible for direct reimbursement from the universal service fund for services provided to schools, libraries and rural health care institutions, but also will subject ICN to certain obligations. Those obligations will include making universal service contributions as a telecommunications carrier and complying with other state and federal regulatory requirements. ICN specifically will comply with the requirement, described in the *Fourth Order on Reconsideration*, that federal subsidies be applied to reduce the costs of service independently of and before any state subsidies are applied. ICN also wishes to emphasize that it seeks eligibility for direct reimbursement only as to its charges for services provided to eligible entities. ICN does not seek any reimbursement for the costs of constructing its facilities or for any other infrastructure.

Request for Expedited Action

ICN also requests expedited action on this request. Expedited action is necessary to prevent Iowa schools and libraries from being penalized as the universal service funding process begins.

^{12/} See *Norlight*, 2 FCC Rcd 132, 134 (customer base would be "limited and stable"), *recon. denied* 2 FCC Rcd 5167 (1987).

Magalie Roman Salas, Esq.

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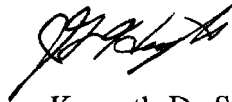
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Under the schedule adopted by the Commission for schools and libraries funding, applications for funding filed during the initial 75 day period — which already has begun — will be processed before, and afforded priority over, later-filed applications. It therefore may be critical for schools and libraries to submit their applications during this time. Iowa schools using ICN services, however, may be unable to submit their applications until such time as ICN's eligibility for direct reimbursement is established. Moreover, some ICN services are provided over its own facilities and other services are provided over resold facilities. Consequently, prior to a determination of ICN's eligibility, some schools could be eligible for support while other schools are not, depending not on the services they purchase but merely on the facilities used to provide those services. Expedited action on this request will avoid both of these potential inequities.

While the facts shown above demonstrate plainly that ICN meets the requirements for funding under Section 254, the Commission may wish to seek comment on this request. To the extent the Commission does intend to seek such comment, ICN respectfully requests that the Commission simultaneously make a preliminary determination that ICN is eligible for direct reimbursement, so that Iowa schools and libraries may proceed with their filings with the Schools and Libraries Corporation.

Please inform us if any questions should arise in connection with this request.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kenneth D. Salomon".

Kenneth D. Salomon
J.G. Harrington

Counsel for the Iowa Telecommunications
and Technology Commission

KDS/JGH/vl